Supreme Court, U.S.
FILED
JAN 6 2000
CLERK

No. 99-962

IN THE
# Supreme Court of the United States

ELMAR LEE PETTIT; NORTH BAY PLUMBING, INC. and NOR-CAL PLUMBING, INC.,
*Petitioners,*
v.
BAY AREA PIPE TRADES PENSION TRUST FUND; BAY AREA PIPE TRADES HEALTH & WELFARE TRUST FUND; U.A. LOCAL NO. 343 HEALTH & WELFARE TRUST FUND; U.A. LOCAL NO. 343 PENSION TRUST FUND; NORTHERN CALIFORNIA PIPE TRADES HEALTH & WELFARE TRUST FUND; NORTHERN CALIFORNIA PIPE TRADES PENSION TRUST FUND and U.A. LOCAL NO. 343 JOURNEYMAN AND APPRENTICE TRAINING TRUST FUND,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION

JOHN J. DAVIS, JR.
*Counsel of Record*
MCCARTHY, JOHNSON & MILLER
595 Market Street, Suite 2200
San Francisco, California 94105
(415) 882-2992
*Attorneys for Respondents*

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

34pp

## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. This Court held in *Peacock v. Thomas* that there is no federal jurisdiction over an action brought to enforce a pre-existing ERISA judgment through corporate veil-piercing, where the action asserts no federal claim. Here the court of appeals ruled that a corporate veil can be pierced in a lawsuit that *does* assert federal claims. Is there any conflict between these holdings?

2. This Court and the Ninth Circuit have long held that LMRA § 301 creates federal jurisdiction over suits for violations of collective bargaining agreements, even if neither party to the action is an employer or a union. ERISA is a separate statute that specifies the parties who may bring suit under it, but by its terms ERISA does not pre-empt other federal laws or rules. Should ERISA continue to be construed as not divesting trust funds of their right to bring § 301 actions?

3. Like every other circuit court of appeals, the Ninth Circuit allows some of its opinions to be designated "unpublished." A portion of the Ninth Circuit's opinion in this case is unpublished, but the entire opinion remains fully reviewable by this Court. Since the unpublished status of the decision has not affected this case in any way, should this circuit-court practice first be addressed by the Judicial Conference rather than by means of certiorari?

TABLE OF CONTENTS


| | Page |
|---|---|
| COUNTERSTATEMENT OF THE QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| INTRODUCTION | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS THE PETITION SHOULD BE DENIED | 4 |
| I. THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION AND *PEACOCK v. THOMAS* | 4 |
| II. ERISA DOES NOT PRE-EMPT THE TRUST FUNDS' CAUSE OF ACTION UNDER LMRA § 301 | 9 |
| A. ERISA Does Not Pre-empt Other Federal Law | 11 |
| B. The Sixth Circuit's Opinion In *United Engineering* Does Not Conflict With The Opinion In This Case | 12 |
| C. This Court Should Not Decide This Issue Because No Lower Court Has Reached It | 13 |
| III. CERTIORARI IS NOT THE PROPER PROCEDURE FOR ADDRESSING PETITIONERS' OBJECTIONS TO UNPUBLISHED DECISIONS | 14 |
| A. A Writ Of Certiorari Is Not The Appropriate Means To Address This Issue | 14 |
| B. Petitioners Have Not Been Harmed By The Ninth Circuit's Decision Not To Publish Part Of Its Opinion | 15 |
| CONCLUSION | 16 |

## TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| *Air Line Pilots Ass'n. v. Northwest Airlines, Inc.*, 627 F.2d 272 (D.C. Cir. 1980) | 11 |
| *Alvares v. Erickson*, 514 F.2d 156 (9th Cir. 1975) | 10 |
| *American Bell, Inc. v. Federation of Telephone Workers*, 736 F.2d 879 (3d Cir. 1984) | 8 |
| *Associated Builders & Contractors v. Local 302 IBEW*, 109 F.3d 1353 (9th Cir. 1997) | 10 |
| *Audit Services, Inc. v. Rolfson*, 641 F.2d 757 (9th Cir. 1981) | 8 |
| *BAC Local 33 Benefit Funds v. America's Marble Source, Inc.*, 950 F.2d 114 (3d Cir. 1991) | 9 |
| *Board of Trustees of the Chicago Plastering Industry Pension Trust Fund v. Duguid Co.*, 761 F.Supp. 1345 (N.D. Ill. 1991) | 9 |
| *Contractors, Laborers, Teamsters and Engineers Health & Welfare Plan v. Hroch*, 757 F.2d 184 (8th Cir. 1985) | 9, 10 |
| *D.E.W., Inc. v. Local 93 Laborers' Int'l Union*, 957 F.2d 196 (5th Cir. 1992) | 9 |
| *Evans v. Einhorn*, 855 F.2d 1245 (7th Cir. 1988) | 9 |
| *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) | 10, 16 |
| *Laborers Clean-Up Contract Administration Trust Fund v. Uriarte Clean-Up Service*, 736 F.2d 516 (9th Cir. 1984) | 10 |
| *Laborers Health and Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983) | 9 |
| *Laborers' Pension Fund v. Concrete Structures of the Midwest, Inc.*, 999 F.2d 1209 (7th Cir. 1993) | 10 |
| *Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc.*, 185 F.2d 978 (9th Cir. 1999) ("*Nor-Cal Plumbing II*") | 4 |
| *Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc.*, 189 F.3d 473 (9th Cir. 1999) | 4 |
| *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960) | 9 |
| *Louisiana Bricklayers & Trowel Trades Pension Fund & Welfare Fund v. Alfred Miller General Masonry Contracting Co.*, 157 F.3d 404 (5th Cir. 1998) | 10 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Mason Contractors' Assoc. of America v. Int'l Council of Employers of Bricklayers & Allied Craftsmen*, 853 F.Supp. 515 (D.D.C. 1994) | 11 |
| *McCray v. New York*, 461 U.S. 961 (1983) | 13 |
| *Milne Employees Association v. Sun Carriers*, 960 F.2d 1401 (9th Cir. 1992) | 10 |
| *Miner v. Atlass*, 363 U.S. 641 (1960) | 14 |
| *Mo-Kan Teamsters Pension Fund and Mo-Kan Teamsters Health & Welfare Fund v. Creason*, 716 F.2d 772 (10th Cir. 1983) | 10 |
| *Morse v. Adams*, 857 F.2d 339 (6th Cir. 1988) | 11 |
| *National Stabilization Agreement Trust Fund v. Commercial Roofing & Sheet Metal*, 655 F.2d 1218 (D.C. Cir. 1981) | 11 |
| *NLRB v. Fullerton Transfer & Storage*, 910 F.2d 331 (6th Cir. 1990) | 8 |
| *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047 (10th Cir. 1993) | 9 |
| *Painting and Decorating Contractors Association v. Painters and Decorators Joint Committee*, 707 F.2d 1067 (9th Cir. 1983) | 10 |
| *Peacock v. Thomas*, 516 U.S. 349 (1996) | *passim* |
| *Reeves v. Sanderson Plumbing Products, Inc.* (Case No. 99-536), *cert. granted*, —— U.S. ——, 68 U.S.L.W. 3310 (1999) | 15 |
| *Rehmar v. Smith*, 555 F.2d 1362 (9th Cir. 1976) | 10 |
| *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105 (9th Cir. 1979) | 8 |
| *Smith v. Evening News Association*, 371 U.S. 195 (1962) | 10 |
| *Stewart v. KHD Deutz of America Corp.*, 75 F.3d 1522 (11th Cir. 1996) | 11 |
| *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962) | 8 |
| *Teamsters Local 348 Health and Welfare Fund v. Kohn Beverage Co.*, 749 F.2d 315 (6th Cir. 1984) | 9 |
| *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. John Tinney Delivery Service*, 732 F.2d 319 (3d Cir. 1984) | 10 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957) | 8 |
| *Textron Lycoming Reciprocating Engine Division v. United Automobile Workers*, 523 U.S. 653 (1998) | 7, 8 |
| *U.A. Local 343 v. Nor-Cal Plumbing*, 48 F.3d 1465 (9th Cir. 1995) | 4 |
| *U.A. Local No. 343 v. Nor-Cal Plumbing*, 797 F. Supp. 767 (N.D. Cal. 1992) | 3, 4 |
| *United Steelworkers of America v. United Engineering, Inc.*, 52 F.3d 1386 (6th Cir. 1995) | 12, 13, 16 |
| *Washington Area Carpenters' Welfare Fund v. Overhead Door Co.*, 681 F.2d 1 (D.C. Cir. 1982) | 10 |
| *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998) | 15 |


STATUTES AND RULES


| | |
|---|---|
| 28 U.S.C. § 331 | 14 |
| 28 U.S.C. § 2071 | 14 |
| 29 U.S.C. § 185 [LMRA § 301] | *passim* |
| 29 U.S.C. § 185(a) [LMRA § 301(a)] | 7 |
| 29 U.S.C. § 1132 [ERISA § 502] | 13 |
| 29 U.S.C. § 1144(d) [ERISA § 514(d)] | 9, 11 |
| 29 U.S.C. § 1145 [ERISA § 515] | 13 |
| 29 U.S.C. § 1344 [ERISA § 4044] | 12, 13 |
| 29 U.S.C. § 1344(a) [ERISA § 4044(a)] | 12 |
| Ninth Circuit Rules 36-1—36-6 | 14 |

IN THE

# Supreme Court of the United States

No. 99-962

ELMAR LEE PETTIT; NORTH BAY PLUMBING, INC. and NOR-CAL PLUMBING, INC.,

*Petitioners,*

v.

BAY AREA PIPE TRADES PENSION TRUST FUND; BAY AREA PIPE TRADES HEALTH & WELFARE TRUST FUND; U.A. LOCAL NO. 343 HEALTH & WELFARE TRUST FUND; U.A. LOCAL NO. 343 PENSION TRUST FUND; NORTHERN CALIFORNIA PIPE TRADES HEALTH & WELFARE TRUST FUND; NORTHERN CALIFORNIA PIPE TRADES PENSION TRUST FUND and U.A. LOCAL NO. 343 JOURNEYMAN AND APPRENTICE TRAINING TRUST FUND,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION

## INTRODUCTION

The petition in this case presents no question worthy of review here. First, it asserts that the decision below conflicts with this Court's holding in *Peacock v. Thomas*,[1]

[1] 516 U.S. 349 (1996).

but even a cursory reading of the two opinions shows that they deal with entirely different situations. *Peacock* held that there is no federal jurisdiction over a veil-piercing action where no substantive federal claim is asserted, while here the Ninth Circuit held that there *is* federal jurisdiction over a sham corporation's owners where a substantive federal claim *is* asserted. Therefore the two holdings do not conflict. In fact, the one relevant dictum in *Peacock* affirmatively *supports* the Ninth Circuit's holding here.

Petitioners' second argument is that ERISA should pre-empt LMRA § 301 with respect to the parties who can sue an employer to recover unpaid fringe benefit contributions. The argument ignores both ERISA's express provision that it does not pre-empt other federal law and the courts' uniformly expansive readings of who may sue under § 301. The Sixth Circuit case on which petitioners rely for a conflict treats an issue so different from this one that there is no conflict between it and the Ninth Circuit's holding here.

Finally, petitioners object to the Ninth Circuit's issuing part of its decision in an unpublished opinion. The objection is not an appropriate basis for a certiorari petition, both because such issues are entrusted in the first instance to the Judicial Conference and because petitioners have not been harmed: the unpublished opinion is reviewable —albeit undeserving of review—regardless of whether it was published.

The petition thus raises no question worthy of the Court's time and effort. It should therefore be denied.

## STATEMENT OF THE CASE

This case involves the fraudulent scheme of a union-signatory plumbing contractor to escape the obligations of a collective bargaining agreement. To carry out their

scheme, the defendants concealed and misrepresented an illegal relationship between the union side and the non-union side of their "double-breasted" business.

In labor-law parlance, "double-breasted" means that the owners of a union-signatory business also have an interest in another, similar non-union business. If the two businesses are entirely separate, and if they deal with each other only at arm's length, then the double-breasted relationship is not unlawful. But where their separateness is not scrupulously maintained, the non-union business may be found to be the "alter ego" of the union signatory. In that event, the non-union company will be bound to the union signatory's labor agreements.

Here, the petitioners transferred the business of Nor-Cal Plumbing, Inc., a long-time union-signatory contractor owned by Elmar Lee Pettit, to North Bay Plumbing, Inc. North Bay was a newly established non-union company purportedly owned by his wife, Audrey Jean Pettit, but in fact owned and managed by Mr. Pettit. North Bay continued Nor-Cal's business, but did not honor Nor-Cal's labor agreements.

The respondent labor-management Trust Funds sued in May 1987 to recover the pension and other fringe benefit contributions they would have received had defendants applied the labor agreement to their entire plumbing business, not just the union side. The Trust Funds also sued for fraud.

On April 22, 1992, the district court granted summary judgment to the Trust Funds, finding that Nor-Cal and North Bay were alter egos. The court awarded the Trust Funds $2,551,244.28 in unpaid contributions, liquidated damages, interest and attorneys' fees, plus $2,000,000.00 in punitive damages.[2] Finding that the circumstances jus-

---

[2] *U.A. Local No. 343 v. Nor-Cal Plumbing*, 797 F. Supp. 767 (N.D. Cal. 1992).

tified disregarding the corporate form, the court held the Pettits personally liable for the damages.[3]

On appeal, the Ninth Circuit affirmed most of the district court's findings.[4] However, it held that there were genuine issues as to alter ego liability and the imposition of personal liability.[5] Accordingly, the court remanded the case for a trial of those issues.

After a seven-week trial, a jury found that Nor-Cal and North Bay were alter egos and had defrauded the Trust Funds. Applying federal standards for piercing corporate veils, the jury found that Mr. Pettit was personally liable. The jury awarded the Trust Funds $1,812,897.60. The district court found that the Trust Funds were also entitled to recover their attorneys' fees and other expenses.[6]

The Ninth Circuit affirmed the judgment in all respects,[7] even though it found ERISA jurisdiction lacking because the lawsuit had been brought in the names of the Trust Funds rather than in the names of the Funds' trustees.[8]

## REASONS THE PETITION SHOULD BE DENIED

### I. THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION AND *PEACOCK v. THOMAS*

In *Peacock v. Thomas*,[9] this Court held that ERISA does not create a separate claim for corporate veil-pierc-

---

[3] *Id.* at 772-773.

[4] *U.A. Local 343 v. Nor-Cal Plumbing*, 48 F.3d 1465, 1473 (9th Cir. 1995), *cert. denied*, 516 U.S. 912 (1995) ("*Nor-Cal Plumbing I*").

[5] *Id.* at 1474, 1476.

[6] The district court has not yet determined the amount of that award.

[7] *Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc.*, 189 F.3d 473 (9th Cir. 1999).

[8] *Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978 (9th Cir. 1999) ("*Nor-Cal Plumbing II*").

[9] 516 U.S. 349 (1996).

ing in an action where no underlying federal claim is asserted.[10] This holding has no bearing where, as here, federal claims *are* asserted in the very same lawsuit in which personal liability is decided.[11]

In *Peacock* the plaintiff had brought an earlier, separate ERISA action for benefits against both his former corporate employer and Mr. Peacock, an officer and shareholder of the corporation.[12] In the earlier case the plaintiff had alleged that Peacock was liable as an ERISA fiduciary, but he had not attempted to pierce the corporate veil to hold Peacock liable. The district court had found the corporation liable, but not Peacock.

After failing to collect the judgment against the corporation, the plaintiff sued Peacock again, this time alleging state-law fraud, state-law conspiracy and veil-piercing under ERISA.[13] This lawsuit was based entirely on Peacock's conduct *after* entry of the earlier judgment against the corporation.[14] It asserted that Peacock had siphoned off the corporation's assets to prevent satisfaction of the judgment. The veil-piercing allegations thus had no connection to the facts underlying the first lawsuit.

This Court held that the district court lacked subject matter jurisdiction over the second lawsuit because it stated no independent ERISA cause of action:

> Thomas' complaint in this lawsuit alleged no violation of ERISA or of the plan. . . . Moreover, Thomas' veil-piercing claim does not state a cause

---

10 *Id.* at 354.

11 *Id.*

12 *Id.* at 351. The petition incorrectly states (at pp. 10 and 12) that *Peacock* was an action to recover unpaid contributions.

13 *Id.* at 351-352.

14 *Id.*

> of action under ERISA and cannot independently support federal jurisdiction. *Even if ERISA permits a plaintiff to pierce the corporate veil to reach a defendant not otherwise subject to suit under ERISA, Thomas could invoke the jurisdiction of the federal courts only by independently alleging a violation of an ERISA provision or term of the plan.* Piercing the corporate veil is not itself an independent ERISA cause of action, "but rather is a means of imposing liability on an underlying cause of action." [15]

Thus, in *Peacock* the Court clearly distinguished the case before it from cases like this one. Here, in the same action, the Trust Funds prosecuted the underlying federal violations and asserted that the Pettits were individually liable for those very violations through veil-piercing. It was on this ground that the Ninth Circuit correctly distinguished *Peacock* from this case.[16] Moreover, in *Peacock* the "veil-piercing conduct" was not part of the ERISA violation giving rise to the first lawsuit, and in fact took place after entry of judgment in that action. Here Mr. Pettit's "veil-piercing conduct" was part of the same course of conduct that proved the Trust Funds' labor law claims.

Because *Peacock* and this case are entirely different, they do not conflict. In fact, *Peacock* strongly suggests that federal jurisdiction over the Pettits is proper here, where both the underlying federal claim and the veil-piercing have been pursued in the same lawsuit. In *Peacock* this Court observed that "[e]ven if ERISA permits a plaintiff to pierce the corporate veil to reach a defendant not otherwise subject to suit under ERISA, Thomas could invoke the jurisdiction of the federal courts only by independently alleging a violation of an ERISA provision

---

[15] *Id.* at 354 (emphasis added).

[16] *Nor-Cal Plumbing II*, 185 F.3d at 985.

or term of the plan." [17] This is what the Trust Funds did here. In a single lawsuit they asserted LMRA § 301 and ERISA claims and asked the court to hold Mr. Pettit personally liable on those claims through veil-piercing. Moreover, in asserting that the corporate form should be disregarded, the complaint alleged that Mr. Pettit *was the employer* and was subject to liability under § 301 and ERISA.[18]

Thus, the Ninth Circuit's holding is entirely consistent with *Peacock*. The petition is wrong in claiming a conflict.

Finally, the petition's reliance on *Textron Lycoming Reciprocating Engine Division v. United Automobile Workers* [19] is entirely misplaced. LMRA § 301(a) provides federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization . . . ." [20] In *Textron Lycoming*, this Court held that § 301 jurisdiction requires an allegation that a collective bargaining agreement has been violated. Petitioners argue that *Textron Lycoming* so strictly limits § 301 jurisdiction to questions of contract violation that issues of personal liability for those violations cannot be reached. But *Textron Lycoming* holds just the opposite—it states that once parties allege a contract violation, § 301 "does not restrict the legal landscape they may traverse." [21]

Here it is undisputed that the Trust Funds alleged and proved a claim within the express language of § 301: petitioners' violation of their collective bargaining agree-

---

17 516 U.S. at 354.

18 Appendix A hereto, ¶¶ 6 and 13.

19 523 U.S. 653 (1998).

20 29 U.S.C. § 185(a).

21 *Id.* at 657-658.

ment. Moreover, corporate veil-piercing made Mr. Pettit the employer in every legal sense. Accordingly, there is no conflict with *Textron Lycoming*, either, and no reason to grant review.

Petitioners argue that trust funds attempting to recover unpaid contributions from corporate employers' owners should be relegated to separate veil-piercing actions brought in state court under state law.[22] This proposal is not only unsupported in law or logic, but would defeat the purposes of § 301. In *Textile Workers Union of America v. Lincoln Mills*,[23] this Court held that § 301 is a mandate for federal courts to fashion a body of federal labor law governing collective bargaining agreements. And in *Teamsters Local 174 v. Lucas Flour Co.*,[24] the Court held that "in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules."

The Ninth Circuit has been true to this principle in deciding veil-piercing issues in § 301 actions for unpaid fringe benefit contributions. Based on the need for uniformity in this important aspect of § 301 enforcement, it has held that federal veil-piercing standards—not the varying state-law rules—should govern.[25] The Third, Sixth, Seventh, Eighth and Tenth Circuits have concurred.[26]

---

22 Petition, p. 12. The petition cites no authority suggesting that state courts would entertain a "veil-piercing" action separately from the lawsuit in which the underlying claims are asserted against the corporation.

23 353 U.S. 448, 456-457 (1957).

24 369 U.S. 95, 103-104 (1962).

25 *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1109-1110 (9th Cir. 1979); *Audit Services, Inc. v. Rolfson*, 641 F.2d 757, 764 (9th Cir. 1981).

26 *American Bell, Inc. v. Federation of Telephone Workers*, 736 F.2d 879, 886 (3d Cir. 1984); *NLRB v. Fullerton Transfer & Stor-*

Contrary to these long-settled holdings, and without even discussing them, the petition urges a rule that would tear a hole in the fabric of § 301 by injecting the vagaries of state-law veil-piercing tests into actions for delinquent contributions. Petitioners offer no good reason for such a result, much less a compelling one. For this reason as well, there is no reason to review the Ninth Circuit's affirmance of the judgment against Mr. Pettit.

## II. ERISA DOES NOT PRE-EMPT THE TRUST FUNDS' CAUSE OF ACTION UNDER LMRA § 301

Petitioners' second argument is that the Trust Funds cannot sue under LMRA § 301 because trust funds are not parties authorized to sue under ERISA. They ignore § 301 itself and the plain language of ERISA's pre-emption provision, which states that ERISA does not pre-empt other federal laws or rules.[27]

Before ERISA was enacted, trust funds were permitted to sue for delinquent contributions under LMRA § 301.[28] And petitioners do not dispute that the circuits have uniformly held § 301 to provide jurisdiction for trust funds' contribution collection actions.[29] Petitioners cite the

---

*age*, 910 F.2d 331, 335 (6th Cir. 1990); *Evans v. Einhorn*, 855 F.2d 1245, 1255 (7th Cir. 1988); *Contractors, Laborers, Teamsters and Engineers Health & Welfare Plan v. Hroch*, 757 F.2d 184, 190 (8th Cir. 1985); *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1054 (10th Cir. 1993) (collecting cases).

[27] 29 U.S.C. § 1144(d).

[28] *BAC Local 33 Benefit Funds v. America's Marble Source, Inc.*, 950 F.2d 114, 121 (3d Cir. 1991) (citing *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960)).

[29] *D.E.W., Inc. v. Local 93 Laborers' Int'l Union*, 957 F.2d 196, 202-203 (5th Cir. 1992); *Teamsters Local 348 Health and Welfare Fund v. Kohn Beverage Co.*, 749 F.2d 315, 316-317, n.2 (6th Cir. 1984); *Laborers Health and Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412, 416-417 (9th Cir. 1983); *Board of Trustees of the Chicago Plastering Industry Pension Trust Fund v. Duguid*

Court's discussion of ERISA's party limitations in *Franchise Tax Board v. Construction Laborers Vacation Trust*,[30] but they fail to mention that in the same opinion, the Court contrasted § 301 and its *lack* of party limitations: "We have not taken a restrictive view of *who* may sue under § 301 for violations of [collective bargaining] contracts . . . ." [31] Likewise, the Ninth Circuit has ruled consistently that § 301 jurisdiction exists "as long as the suit is for violation of a contract between a union and employer even if neither party is a union or an employer." [32]

ERISA itself explicitly states that it does not pre-empt other federal laws, and petitioners have not shown any conflict between ERISA and LMRA § 301 on the issue presented here. Accordingly, the petition should be denied.

---

*Co.*, 761 F. Supp. 1345, 1347 n.2 (N.D. Ill. 1991). And courts have frequently noted § 301 and ERISA jurisdiction in trust funds' contribution collection actions. *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. John Tinney Delivery Service*, 732 F.2d 319, 320, 321 n.1 (3d Cir. 1984); *Louisiana Bricklayers & Trowel Trades Pension Fund & Welfare Fund v. Alfred Miller General Masonry Contracting Co.*, 157 F.3d 404, 406 (5th Cir. 1998); *Laborers' Pension Fund v. Concrete Structures of the Midwest, Inc.*, 999 F.2d 1209, 1210 (7th Cir. 1993); *Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan v. Hroch*, 757 F.2d 184, 186 (8th Cir. 1985); *Laborers Clean-Up Contract Administration Trust Fund v. Uriarte Clean-Up Service, Inc.*, 736 F.2d 516, 518 (9th Cir. 1984); *Mo-Kan Teamsters Pension Fund and Mo-Kan Teamsters Health & Welfare Fund v. Creason*, 716 F.2d 772, 773 (10th Cir. 1983); *Washington Area Carpenters' Welfare Fund v. Overhead Door Co.*, 681 F.2d 1, 3 (D.C. Cir. 1982).

[30] 463 U.S. 1 (1983).

[31] 463 U.S. at n.28 (emphasis in original; citations omitted).

[32] *Rehmar v. Smith*, 555 F.2d 1362, 1366 (9th Cir. 1976), citing *Smith v. Evening News Association*, 371 U.S. 195, 199-201 (1962)); *accord, Alvares v. Erickson*, 514 F.2d 156, 162 (9th Cir. 1975); *Painting and Decorating Contractors Association v. Painters and Decorators Joint Committee*, 707 F.2d 1067, 1071 (9th Cir. 1983); *Milne Employees Association v. Sun Carriers*, 960 F.2d 1401, 1407 (9th Cir. 1992); *Associated Builders & Contractors v. Local 302 IBEW*, 109 F.3d 1353, 1357 n.6 (9th Cir. 1997).

**A. ERISA Does Not Pre-empt Other Federal Law.**

Petitioners argue that the Trust Funds' long-established right to sue under LMRA § 301 for delinquent contributions has now "disappeared" because ERISA contains a similar cause of action. They contend that ERISA now "occupies the field" of delinquent contribution collections and pre-empts other laws in this area, including § 301.

But by its own terms, ERISA does not pre-empt other federal laws. Section 514(d) of ERISA[33] states:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.

The District of Columbia Circuit has held that § 514(d) preserves not only other federal legislation,[34] but also federal case law. In *National Stabilization Agreement Trust Fund v. Commercial Roofing & Sheet Metal*,[35] the same court found that ERISA's legislative history "reveal[s] no congressional intent to undermine the validity of existing [federal] legislation, or, inferentially, of its construction by the judiciary." The Sixth and Eleventh Circuits have held that this includes § 301 and its accompanying common law.[36]

LMRA § 301 suits to collect fringe benefit contributions are thus clearly preserved after ERISA's enactment by ERISA § 514(d).

---

[33] 29 U.S.C. § 1144(d).

[34] *Air Line Pilots Ass'n. v. Northwest Airlines, Inc.*, 627 F.2d 272, 275-276 (D.C. Cir. 1980).

[35] 655 F.2d 1218, 1222-1223 (D.C. Cir. 1981).

[36] *Stewart v. KHD Deutz of America Corp.*, 75 F.3d 1522, 1528 (11th Cir. 1996); *Morse v. Adams*, 857 F.2d 339, 343 (6th Cir. 1988); *Mason Contractors Association v. International Council of Employers of Bricklayers*, 853 F. Supp. 515, 525 (D.D.C. 1994).

**B. The Sixth Circuit's Opinion In *United Engineering* Does Not Conflict With The Opinion In This Case.**

Petitioners cite only one case as a purported conflict on this issue: the Sixth Circuit's decision in *United Steelworkers of America v. United Engineering, Inc.*[37] In fact, there is no conflict because *United Engineering* is readily distinguishable from this case.

In *United Engineering*, a pension plan had been terminated. ERISA § 4044[38] provided a detailed method by which the Pension Benefit Guarantee Corporation was to allocate the assets of a terminated plan among competing claimants, including a set of allocation priorities. Instead of pursuing the plan participants' ERISA rights with PBGC, the Union sued their employers directly under LMRA § 301 for nonguaranteed pension benefits.

The court ruled that such a lawsuit conflicted too directly with the ERISA allocation scheme. It found that the ERISA provisions governing such benefits "establish a detailed priority scheme by which the PBGC allocates the nonguaranteed amounts. 29 U.S.C. § 1344(a). These detailed provisions seem to allocate all responsibility for disbursement of nonguaranteed benefits to the PBGC, strongly suggesting that suits against plan sponsors to recover those same benefits are precluded."[39]

The court concluded that allowing plan participants to bring suit directly against the plan sponsor would not only contravene Congress' carefully crafted priority scheme, in which guaranteed benefits are disbursed before nonguaranteed benefits, but would also raise the possibility of double recovery for participants.[40]

---

[37] 52 F.3d 1386 (6th Cir. 1995).

[38] 29 U.S.C. § 1344.

[39] *Id.* at 1393.

[40] *Id.* at 1394. *See* 29 U.S.C. § 1344.

In *United Engineering*, the Sixth Circuit was faced with a use of LMRA § 301 that could override the priority system prescribed by ERISA § 4044 for allocating the assets of a terminated plan. By contrast, here there is no such conflict between § 301 and ERISA's collection provisions, §§ 502 and 515.[41] ERISA contains no scheme of collection priorities that could be defeated by allowing contribution collection actions under § 301, and there is no possibility of a double recovery here.

The LMRA § 301 issues addressed in *United Engineering* are thus entirely different from those presented here. Unlike the situation in *United Engineering*, here there is no plausible argument that ERISA was meant to displace suits like this one. And given the express language of ERISA § 514(d), no such displacement can be inferred.

Because *United Engineering* addresses a wholly different issue than the one in this case, its holding does not conflict with the Ninth Circuit's decision here.

### C. This Court Should Not Decide This Issue Because No Lower Court Has Reached It.

As discussed above, the decision in *United Engineering* does not conflict with the Ninth Circuit's opinion below because *United Engineering* does not treat ERISA's pre-emptive effect on contribution collection actions under LMRA § 301. In fact, it appears that *no* court has held that ERISA limits the parties who can sue or be sued in § 301 collection actions. In the absence of any conflict of decision, certiorari should be denied.[42]

---

[41] 29 U.S.C. §§ 1132 and 1145.

[42] *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.).

## III. CERTIORARI IS NOT THE PROPER PROCEDURE FOR ADDRESSING PETITIONERS' OBJECTIONS TO UNPUBLISHED DECISIONS

Petitioners' final argument is that the Ninth Circuit's decision should be reviewed because part of it was unpublished. This issue is not appropriate for certiorari.

### A. A Writ Of Certiorari Is Not The Appropriate Means To Address This Issue.

The Ninth Circuit has promulgated local rules of practice, including rules regarding publication of its opinions,[43] pursuant to 28 U.S.C. § 2071 and FRAP 47. Under 28 U.S.C. § 331, the Judicial Conference of the United States reviews those rules "for consistency with federal law" and may modify or abrogate them. The Judicial Conference also advises this Court regarding its rules of practice and procedure.[44]

This Court has held that these statutory procedures are "designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters . . . ."[45] Thus, the Judicial Conference is the appropriate body to address this issue in the first instance. It can then advise this Court on rules regarding publication.

The parties to this litigation, by contrast, are unequipped to present "informed opinion from all relevant quarters," especially the circuit judges' views. Because this issue is entrusted to the Judicial Conference in the first instance, it should not be addressed by means of a writ of certiorari.

---

[43] Ninth Circuit Rules 36-1 through 36-6.

[44] *Id.*

[45] *Miner v. Atlass*, 363 U.S. 641, 650 (1960).

**B. Petitioners Have Not Been Harmed By The Ninth Circuit's Decision Not To Publish Part Of Its Opinion.**

Petitioners identify no harm that they have suffered from the partial publication. In fact, they have not been harmed—the unpublished opinion resolved the issues of their appeal, and unpublished decisions are fully reviewable by this Court.[46]

Nor can petitioners show how an order to publish the decision would change the result of this case. Because the publication status of the Ninth Circuit's decision does not affect the petitioners in any way, they have no standing to complain about it.

Petitioners have also tried to frame this issue as a "conflict" among the courts of appeal. But here, too, petitioners have identified no conflict which affects the instant case. Every circuit court has a rule allowing for unpublished opinions. The only "conflict" among these rules is whether unpublished opinions are to be given precedential effect. Again, this works no harm on the petitioners.

Because petitioners have cited no conflict that has any bearing on the instant case, certiorari is not appropriate here.

---

[46] For example, the Court has recently granted review in two unpublished court of appeals decisions, *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, —, 119 S. Ct. 391, 394 (1998) and *Reeves v. Sanderson Plumbing Products, Inc.* (Case No. 99-536), *cert. granted*, —— U.S. ——, 120 S. Ct. 444, *see* 68 U.S.L.W. 3310 (1999). After certiorari was granted on November 8, 1999, the Fifth Circuit published its decision in *Reeves*. —— F.3d ——, 1999 U.S. App. LEXIS 29724 (5th Cir. Dec. 1, 1999).

## CONCLUSION

As the foregoing discussion demonstrates, the petition presents no good reason for granting review. The Ninth Circuit's decision does not conflict with this Court's in *Peacock* or the Sixth Circuit's in *United Engineering*. In fact, the holding below is in accord with the relevant dictum in *Peacock*.

Nor is there any conflict between this exercise of LMRA § 301 jurisdiction and ERISA's party limitations. ERISA does not pre-empt § 301, and as this Court noted in *Construction Laborers Vacation Trust*, the two statutes confer standing very differently.

Finally, certiorari is not the proper means for reviewing circuit rules on unpublished decisions. The Judicial Conference should consider petitioners' objections in the first instance, and in any event petitioners have suffered no harm from lack of publication.

For all of these reasons, the petition should be denied.

Respectfully submitted,

JOHN J. DAVIS, JR.
*Counsel of Record*
MCCARTHY, JOHNSON & MILLER
595 Market Street, Suite 2200
San Francisco, California 94105
(415) 882-2992
*Attorneys for Respondents*

January 6, 2000

# APPENDIX

APPENDIX A

[Filed May 8, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

---

Case No. C 87 2365 WWS

U.A. LOCAL NO. 343 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. AFL-CIO; U.A. LOCAL NO. 159, 342, 343 and 444 COMBINED PENSION TRUST FUND; and U.A. LOCAL NO. 343 JOURNEYMAN AND APPRENTICE TRAINING TRUST FUND,

*Plaintiffs,*

v.

NOR-CAL PLUMBING, INC.; NORTH BAY PLUMBING, INC.; ELMAR LEE PETTIT, a.k.a. Elmer Lee Pettit; and AUDREY JEAN PETTIT.

*Defendants.*

---

COMPLAINT FOR VIOLATION OF COLLECTIVE BARGAINING AGREEMENT AND FOR FRAUD
[29 U.S.C. §§ 185(a) & 1132]

Plaintiffs allege:

JURISDICTION

1. This action is brought for redress of defendants' violations of a collective bargaining agreement. The Court has jurisdiction of these claims pursuant to the provisions of Section 301(a) of the Labor Management Re-

lations Act, as amended ["LMRA;" 29 U.S.C. Section 185(a)]. This action is also brought to compel defendants' compliance with their obligations to account for and pay fringe benefits to the plaintiff Trust Funds under the Employee Retirement Income Security Act of 1974 ["ERISA;" 29 U.S.C. Section 1001, *et seq.*]. The Court has jurisdiction of these claims pursuant to Section 502 of ERISA [29 U.S.C. Section 1132].

VENUE

2. Plaintiffs U.A. Local No. 159, 343, [sic] 343 and 444 Combined Health & Welfare Trust Fund; U.A. Local No. 159, 342, 343 and 444 Combined Pension Trust Fund; and U.A. Local No. 343 Journeyman and Apprentice Training Trust Fund (collectively "Bay Area Pipe Trades Trust Funds" or "Trust Funds") are employee benefit plans governed by ERISA. Said Trust Funds are administered in San Francisco, California. Accordingly, venue is proper within the Northern District of California pursuant to Section 502(e)(2) of ERISA [29 U.S.C. Section 1132(e)(2)].

PARTIES

3. Plaintiff U.A. Local No. 343 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, ("U.A. Local 343") is an unincorporated labor organization which represents, inter alia, workers employed in the building and construction industry in Napa and Solano Counties, California.

4. Plaintiffs Bay Area Pipe Trades Trust Funds are jointly administered labor-management trust funds established pursuant to the provisions of Section 302 of the LMRA [29 U.S.C. Section 186] for the purpose of providing employee benefits within the meaning of Sections 3 and 4 of ERISA [29 U.S.C. Sections 1002 and 1003].

5. Defendants Nor-Cal Plumbing, Inc. ("Nor-Cal") and North Bay Plumbing, Inc. ("North Bay") are California corporations conducting a construction contracting business in Napa and Solano Counties, California.

6. Defendant Elmar Lee Pettit, also known as Elmer Lee Pettit, is the chief executive of defendants Nor-Cal and North Bay and is the president of defendant Nor-Cal. Defendant Audrey Jean Pettit is the president of defendant North Bay. Defendants Elmar Lee Pettit and Audrey Jean Pettit are husband and wife, are the owners of defendants Nor-Cal and North Bay, and are "employers" within the meaning of Section 3(2) of the National Labor Relations Act [29 U.S.C. Section 152(2)] and Section 3(5) of ERISA [29 U.S.C. Section 1002(5)].

## STATEMENT OF CLAIM

7. For a continuous period since at least 1965, defendant Nor-Cal has been a party signatory to successive collective bargaining agreements with plaintiff U.A. Local 343. On or about June 30, 1983, defendant Nor-Cal executed a two-year Memorandum of Understanding modifying the then-existing Master Labor Agreement by and between the Plumbing, Heating and Cooling Contractors Association of Napa, Solano and Lake Counties and plaintiff U.A. Local 343. A true and correct copy of said Memorandum of Understanding is attached hereto as Exhibit 1 and incorporated herein by this reference. A true and correct copy of the 1983-1985 Master Labor Agreement, as modified by said Memorandum of Understanding, is attached hereto as Exhibit 2 and incorporated herein by this reference.

8. On or about May 7, 1984, defendant Nor-Cal executed the Residential Plumbing Addendum to the Master Labor Agreement, thereby modifying the Master Labor

Agreement and extending said agreement to at least June 30, 1987. A true and correct copy of said Residential Plumbing Addendum is attached hereto as Exhibit 3 and incorporated herein by this reference.

9. Defendant North Bay has performed work which is covered by the Residential Plumbing Addendum and the Master Labor Agreement and which is required to be performed by members of the stipulated bargaining unit set forth in the Master Labor Agreement to which defendant Nor-Cal is and has been bound. Plaintiffs are informed and believe and thereupon allege that said performance of work has been conducted by said defendants at least since some time in 1983, and possibly for a much longer period of time.

10. Defendants Nor-Cal and North Bay are the "alter ego's" of each other within the meaning of federal labor law. The relationship between defendants Nor-Cal and North Bay is characterized by:

a) common ownership;

b) interrelation of operations;

c) common management; and

d) centralized control of labor relations.

Further, defendants have diverted business from defendant Nor-Cal to defendant North Bay for the express purpose of avoiding defendant Nor-Cal's obligations under the Residential Plumbing Addendum and the Master Labor Agreement.

11. By reason of the relationship described above, defendants Nor-Cal and North Bay became bound as a single entity to the Residential Plumbing Addendum and the Master Labor Agreement as of the time said relationship was created.

12. Defendants have failed and refused to apply the terms and conditions of the Residential Plumbing Addendum and the Master Labor Agreements to defendant North Bay, and have thereby violated their obligations thereunder and under Section 515 of ERISA [29 U.S.C. Section 1145].

13. Defendants Elmar Lee Pettit and Audrey Jean Pettit should be held personally and individually liable to plaintiffs for the damages sought herein on the following grounds:

(a) in doing the acts herein alleged, said individual defendants have shown little or no respect for the separate identities of the defendant corporations;

(b) in conducting the business and corporate affairs of the defendant corporations, said individual defendants have given little or no respect to the separate identities of said corporations;

(c) recognition of the defendant corporations as separate entities would result in injustice to plaintiffs; and

(d) there was a fraudulent intent employed in the establishement and operation of the corporations, as is more specifically alleged below.

14. Plaintiffs have fully performed their obligations under the Residential Plumbing Addendum and the Master Labor Agreements.

## COUNT I

## CLAIM OF PLAINTIFF U.A. LOCAL 343 FOR DAMAGES

15. By reason of defendants' failure and refusal to apply the terms of the Residential Plumbing Addendum and the Master Labor Agreement to defendant North Bay, persons represented by plaintiff U.A. Local 343 who have been employed and are entitled to employment by defendants at work covered by the Residential Plumbing Addendum and the Master Labor Agreement have lost wages, vacation pay and other contractually guaranteed benefits. Plaintiff U.A. Local 343 is informed and believes and thereupon alleges that such damages exceed $3,500,000.00. The exact amount of damages is presently unknown to plaintiff U.A. Local 343, but will be proved at the trial of this lawsuit.

16. By reason of defendants' failure and refusal to apply the terms of the Residential Plumbing Addendum and the Master Labor Agreement to defendant North Bay, plaintiff U.A. Local 343 has lost dues monies it is and has been entitled to receive from the persons unlawfully deprived of the work performed by defendants under the guise of defendant North Bay. Plaintiff U.A. Local 343 is informed and believes and thereupon alleges that such damages exceed $115,000.00. The exact amount of such damages is presently unknown to plaintiff U.A. Local 343, but will be proved at the trial of this lawsuit.

## COUNT II

## CLAIM OF PLAINTIFF TRUST FUNDS FOR AUDIT AND DAMAGES SHOWN DUE

17. The trust agreements governing plaintiff Trust Funds authorize and obligate the trustees of plaintiff

Trust Funds to adopt appropriate collection procedures to enforce, by suit in court or otherwise, the prompt payment of contributions to the funds and to audit the books and records of any participating employer to determine whether or not contributions are being made in accordance with the trust agreements and the Master Labor Agreement. In adopting the Master Labor Agreement and the trust agreements, defendant Nor-Cal agreed, upon request of an authorized representative of the Trust Funds, to permit auditors designated by the Trust Funds to review any and all records relevant to the enforcement of the provisions of the collective bargaining agreement and the trust agreements. Defendant Nor-Cal further agreed to pay the cost of the audit and also agreed that if it failed or refused to permit audit entry as required by the aforementioned agreements, it would be responsible for all attorneys' fees and costs expended by the Trust Funds in securing compliance, in addition to any other relief provided by the court.

18. By reason of defendants' failure and refusal to apply the terms of the Residential Plumbing Addendum and the Master Labor Agreement to defendant North Bay, defendants have deprived plaintiff Trust Funds of fringe benefit contributions to which said plaintiffs are entitled and have precluded plaintiff Trust Funds from determining by audit the fringe benefit contributions owed to said plaintiffs based on work performed by defendants. In the absence of such an audit and review of defendants' books and records, plaintiff Trust Funds are not able to determine the extent of defendants' obligations to report and to pay fringe benefit contributions for each hour paid for or worked under the coverage of the Residential Plumbing Addendum and the Master Labor Agreement. Plaintiff Trust Funds are informed and believe and thereupon allege that the amount of fringe benefits owed and unpaid by defendants exceeds $1,000,000.00.

19. Plaintiff Trust Funds have no plain, speedy or adequate remedy at law.

20. Under the terms of the aforementioned agreements, defendant Nor-Cal agreed to make contributions as required by those agreements and to be subject to and bound by all terms and conditions of the various trust agreements, and further promised that in the event any monthly contributions were not paid when due, defendant Nor-Cal would pay the sum of $100.00 or ten percent (10%) of the amount of the particular contributions, whichever is the greatest amount, for each delinquency to each plaintiff Trust Fund as and for liquidated damages, and not as a penalty. Under the afore-mentioned trust agreements, defendant Nor-Cal further agreed that if it failed to pay the contributions in full, including the liquidated damages, before the last business day of the calendar month following the due date, the liquidated damages would be increased to twenty percent (20%) of the amount due and unpaid. At all times herein mentioned it was and now would be extremely difficult, if not impracticable, to fix the amount of actual damages incurred by plaintiff Trust Funds as a result of the nonpayment of said contributions. The amounts agreed upon for liquidated damages represent a reasonable endeavor to ascertain and compensate for damages caused the plaintiff Trust Funds by the nonpayment of contributions. Under the afore-mentioned trust agreements, the liquidated damages are added to the principal sum due and unpaid and the whole thereof bears interest at the rate of twelve percent (12%) per annum until paid.

21. It has been necessary for plaintiff Trust Funds to engage counsel for the purpose of enforcing defendants' obligations under the aforementioned agreements. Plaintiff Trust Funds are entitled to reasonable attorneys' fees, accounting costs and other reasonable expenses incurred

in connection with this matter, in addition to the fringe benefit contributions, liquidated damages and interest owed by defendants due to defendants' failure and refusal to apply the terms of the Residential Plumbing Addendum and the Master Labor Agreement to defendant North Bay.

## COUNT III

## CLAIM OF ALL PLAINTIFFS FOR FRAUD

22. In doing the acts and conducting their business as described above, defendants have deliberately concealed from plaintiffs the true nature and extent of their business. Said concealment has been accomplished through affirmative acts of deception as well as failures to disclose material information. Defendants thereby have withheld from plaintiffs material information concerning plaintiffs' rights and entitlements under the Residential Plumbing Addendum and the Master Labor Agreement and have withheld said rights and entitlements themselves. Moreover, defendants have made affirmative, knowing, material misrepresentations to plaintiffs in sending them monthly fringe benefit contribution reports reflecting only the hours worked under the name of defendant Nor-Cal rather than the full number of hours worked by defendants' employees within the coverage of the Residential Plumbing Addendum and the Master Labor Agreement.

23. In committing the above-described acts of fraud, defendants acted willfuly, maliciously, oppressively and with the intent to deceive and defraud plaintiffs and to deprive the persons represented by plaintiff U.A. Local 343 of the work opportunities, wages and fringe benefits to which they were and are entitled. Plaintiffs are therefore entitled to recover punitive and exemplary damages from defendants in the amount of $2,500,000.00.

## COUNT IV

## CLAIM OF PLAINTIFF TRUST FUNDS FOR PUNITIVE DAMAGES

24. In failing to make the required contributions defendants acted knowingly and deliberately to defraud plaintiff Trust Funds, and did so in a willful and malicious manner. Plaintiff Trust Funds are therefore entitled under ERISA to an award of punitive or exemplary damages from defendants in the amount of $2,500,000.00.

WHEREFORE, plaintiffs pray judgment against defendants as follows:

1. For an order compelling defendants to submit to an audit as requested and to allow the inspection and audit of the payroll records of defendants;

2. For such damages by way of unpaid wages, vacation pay, dues and fringe benefit contributions as are disclosed by the audit;

3. For damages in a sum equal to the cost of performing the audit;

4. For liquidated damages on the vacation pay and fringe benefit contribution shortages disclosed by the audit, plus interest on the whole sum due at the rate of twelve percent (12%) per annum from the due date until paid;

5. For reasonable attorneys' fees and litigation expenses;

6. For punitive damages in the amount of $5,000,000.00;

7. For their costs of suit; and

8. For such other and further relief as the Court deems just and proper.

McCARTHY, JOHNSON & MILLER

By /s/ John J. Davis, Jr.
JOHN J. DAVIS, JR.
Attorneys for Plaintiffs

DATED: May 8, 1987